No. 82-1167

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND DONNA MARIE JACOBSEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondents repeatedly assert that the DEA agents conducted an "unlimited" search (Br. in Opp. 8) that "was more extensive than the search by Federal Express" (*id.* at 6). But respondents acknowledge that Federal Express employees opened the package, and removed and viewed the powder inside the transparent container (*ibid.*). Indeed, the court of appeals, which ruled in respondents' favor, stated that the powder was visible at the time the package was given to the agents by the Federal Express employees (Pet. App. 1a; see Br. in Opp. 6 n.2).[1] Respondents suggest that the agents exceeded the scope of the private search by removing samples of powder from the transparent container. See, *e.g.*, Br. in Opp. 6, 8. But as we explained in

[1]Respondents assert that this is not true (Br. in Opp. 6) but they do not dispute the principle that the government infringes no legitimate expectation of privacy so long as it does not exceed the scope of a previous private search—no matter what condition the package is in

the petition, this action cannot possibly be characterized as a search, because the powder had already been fully exposed to view by the Federal Express employees. See Pet. 10 n.6. Neither respondents nor the court of appeals has suggested that the taking of samples was an impermissible seizure—which it plainly was not. See *ibid.*

Thus the only respect in which the agents can be said to have gone "beyond the scope of the private search" (Br. in Opp. 8) was in conducting the field test. But as we explained in the petition (Pet. 7-9), the field test was capable of revealing only one fact—whether or not the powder that appeared to be cocaine was in fact cocaine. That test was incapable of revealing any information whatever about an innocent substance, or about innocent persons or innocent activities. The field test therefore could not have defeated any legitimate expectation of privacy, or infringed any interest protected by the Fourth Amendment, and no purpose whatever is served by requiring a warrant before such a test is conducted.

Respondents offer no arguments refuting the correctness of our position that the field test simply does not implicate Fourth Amendment values. Respondents do not identify any legitimate privacy interest they have in concealing the contraband nature of the suspicious powder that was lawfully in the agents' possession; nor do they explain how the agents' action could possibly have exposed to the agents, or given them knowledge of, anything else that petitioners had a legitimate interest in keeping private once the Federal Express employees had opened the package. Respondents

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when the private parties deliver it to the government (see *Walter* v. *United States*, 447 U.S. 649, 656, 659 & n.14 (1980) (opinion of Stevens, J.); *id.* at 663 (Blackmun, J., dissenting))—and they do not dispute that Federal Express employees viewed the powder in the transparent container.

also do not cite a single case in which a court has suggested that any interests of the kind affected by the field test are entitled to the protection of the Warrant Clause.

2. Respondents urge (Br. in Opp. 9-10) that the court of appeals was mistaken in describing *United States* v. *Barry*, 673 F.2d 912 (6th Cir. 1982), cert. denied, No. 81-6942 (Oct. 12, 1982), as presenting "almost identical circumstances" and in saying (Pet. App. 6a n.4) that its decision conflicted with *Barry*. But in both cases the defendants shipped contraband in closed, opaque packages; in both cases, private shippers opened the packages, discovered suspicious substances, and notified the authorities; in both cases, the authorities then conducted a chemical analysis. The fact that the contraband in *Barry* was labelled "Methaqualone," while the contraband nature of respondents' cocaine was apparent only from its appearance and packaging, is immaterial; respondents point to nothing in the court of appeals' opinion suggesting that the court would have upheld the field test if the plastic bags containing respondents' cocaine had been so labelled.[2]

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[2]Respondents disagree with our contention that the logic of the court of appeals' ruling would extend to "laboratory testing of *lawfully seized* substances" (Br. in Opp. 11, emphasis in original). But respondents concede that their package "lawfully came into government possession" (*id.* at 8) and that private parties had already exposed the cocaine to plain view. Respondents do not explain why the court of appeals would distinguish this case from one in which the authorities have lawfully obtained possession of contraband through some means other than the actions of private parties.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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